

Case No. 1:13-cv-1563
Gwin, J.

delay has resulted in serious prejudice,” a court should deny a disqualification motion as waived.^{5/}

Here, NexPay’s motion is based on email communications it says it “recently discovered.” This email communication, however, occurred between its own General Counsel and CFO and counsel for ECHO. And, those emails and other contemporaneous emails sent by or to NexPay’s counsel date to April and May 2013. NexPay therefore should have been on notice for, at minimum, the past eight months about Ashmus’s and Murnane’s roles and their potential relevance to Counts I, II, VII, and VIII.

Yet, NexPay has waited to file its motion for disqualification after document discovery is nearly complete, a mere month in advance of depositions, and only four months away from trial. Disqualifying Plaintiffs’ counsel at this time would highly prejudice ECHO. Therefore, the Court finds that Defendant’s motion is untimely and that NexPay has waived its right to file such a motion.

Second, Defendant NexPay has not made a showing that Ashmus and Murnane will be necessary witnesses at trial. Ohio Rule of Professional Conduct 3.7(a) does not require disqualification of counsel where the lawyer may be a witness. Instead, it requires disqualification where the lawyer is a “necessary witness.”

In this case, the Defendants have not demonstrated that either Ashmus or Murnane is a necessary witness with respect to this proceeding. NexPay could introduce the emails into evidence and elicit testimony about them from NexPay’s General Counsel. And, the emails themselves are not contested. The emails can speak for themselves on the relevant issues. Therefore, NexPay has

^{5/} *Sarbey v. Nat’l City Bank, Akron*, 66 Ohio App. 3d 18, 30 (Ohio App. Ct. 1990).

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not made a showing that Ashmus or Murnane will be a necessary witness.^{6/}

As a result, the Court finds that disqualifying Plaintiffs' counsel would be inappropriate and it therefore **DENIES** the Defendants' motion.

IT IS SO ORDERED.

Dated: February 7, 2014

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

^{6/} See *Popa Land Co. v. Fragnoli*, 2009-Ohio-1299, ¶ 15 (Ohio App. Ct. 2009) (“[A] ‘necessary witness’ is someone whose proposed testimony is ‘relevant and material’ and ‘unobtainable elsewhere.’”) (citations omitted).